

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Jeffrey D. Gilbert

v.

Civil No. 04-cv-327-PB

Atlantic Trust Company, N.A.
d/b/a Atlantic Trust/Pell Rudman

O R D E R

Plaintiff moves to "Amend Second Amended Complaint". The defendant objects relying upon Judge Barbadoro's order of September 3, 2005 dismissing the RSA 421-B claim from the first complaint and upon Karvelas v. Melrose-Wakefield Hospital, 360 F.3d 220, 241 (1st Cir. 2004) and Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 388 (1st Cir. 1994). Defendant's statement of the law is correct. However, Judge Barbadoro's order addressed a count in the first complaint which had already been replaced by my order of August 19, 2005 granting the motion to amend (document no. 29).

The defendant's motion (document no. 16), a dispositive one, was sent to Judge Barbadoro in this paperless filing era without the whole file. Meanwhile, the motion to amend a non-dispositive one, was sent to me without a file. Each of us acted in ignorance of the motion before the other.

The motion for judgment on the pleadings (document no. 16) became moot when I granted the motion to amend. In effect, Judge Barbadoro's order was a nullity and it is hereby withdrawn. The pending motion for judgment on the pleadings as to the 93-A claim (document no. 35) is not moot since it is directed to the same claim in the second amended complaint and the proposed amended second complaint.

The motion to "Amend Second Amended Complaint" (document no. 34) is granted as there appears to be no prejudice and it is sufficient to avoid facial futility.

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: September 30, 2005

cc: Michael C. Harvell, Esq.
John-Mark Turner, Esq.
Martha Van Oot, Esq.